

1989

Rodriguez v. Rodriguez : Brief of Respondent

Utah Court of Appeals

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BRIEF

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DOCKET NO.

890492-CA

IN THE UTAH COURT OF APPEALS

CAROLYN RODRIGUEZ,

Plaintiff/Respondent,

vs.

FIDEL H. RODRIGUEZ,

Defendant/Appellant.

Appellant No. 890492-CA

Priority No. 14

BRIEF OF PLAINTIFF/RESPONDENT

Response to an appeal from a Decree of Divorce from the Second
Judicial District Court of Davis County, State of Utah, the
Honorable Rodney S. Page, District Judge, presiding.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF JURISDICTION.....	1
NATURE OF THE CASE.....	1
ISSUE ON APPEAL.....	1
DETERMINATIVE STATUTES.....	1
STATEMENT OF THE CASE.....	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT I.....	4
THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN MAKING THE ALIMONY AWARD.	
A.....	4
CONSIDERATION OF THE REQUISITE FACTORS SUPPORT THE ALIMONY AWARD.	
B.....	6
IN ORDER TO MAINTAIN PLAINTIFF AT A STANDARD OF LIVING REASONABLY APPROXIMATING THAT OF THE DEFENDANT AND WHICH THE PARTIES ENJOYED DURING THE MARRIAGE, THE ALIMONY AWARD IS REQUIRED.	
C.....	7
THE TRIAL COURT WAS NOT LIMITED TO ANY ALIMONY AWARD OF FIVE (5) YEARS DURATION.	
ARGUMENT II.....	9
THE RESPONDENT IS ENTITLED TO ATTORNEY'S FEES IN THE APPEAL.	
CONCLUSION.....	9
CERTIFICATE OF MAILING.....	10
ADDENDUM.....	11

CAROLYN RODRIGUEZ,
Plaintiff/Respondent,

FIDEL H. RODRIGUEZ,
Defendant/Appellant.

Priority No. 14

Response to an appeal from a Decree of Divorce from the Second Judicial District Court of Davis County, State of Utah, the Honorable Rodney S. Page, District Judge, presiding.

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Jurisdiction

The Court of Appeals is vested with jurisdiction over this matter pursuant to 78-2a-3(2)(h) i.e. an appeal from District Court involving a domestic relations case.

Nature of the Case

This is an appeal from an original Decree of Divorce rendered by the Honorable Douglas L. Cornaby in the Second Judicial District Court of Davis County, State of Utah.

Issue on Appeal

Did the trial Court abuse its discretion in awarding Plaintiff/Respondent \$300.00 per month alimony?

Determinative Statutes

The underlying matter is governed by 30-3-5 U.C.A. regarding the trial Court's equitable powers in divorce actions. Reference is also made to 30-3-3 U.C.A. and Rule 34 of the Utah Rules of Civil Procedure. (Verbatim in Addendum.)

Statement of the Case

The Honorable Douglas L. Cornaby heard the trial of this matter in the Second Judicial District Court of and for Davis County, State of Utah, on March 30, 1989. The Court received evidence from the parties, together with additional witnesses,

after first receiving a stipulation from counsel for the parties as to certain facts and agreed upon disposition of assets and debts. (Tp. 3-16).

The parties were originally married in Essex, England, on June 17, 1967, and subsequently returned to the United States, and thereafter Plaintiff became a citizen. (Tp. 18). Two children were born as issue of the marriage, Nicola Ann Rodriguez and Jaime Christopher Rodriguez, the latter of which was 17 years of age at the time of the trial and turned 18 on June 30, 1989.

During the period of marriage the Defendant was initially in the military and subsequently obtained employment as a civil servant of the United States Government and, at the time of the divorce, was employed at Hill Air Force Base earning gross pay of \$3,159.00 per month. (Tp. 19-21).

The Plaintiff was employed approximately one-half ($1/2$) of the marriage, spending seven and one-half ($7-1/2$) years with First Security Bank as a teller and loan department clerk, wherein her highest rate of pay was \$5.92 per hour. The Plaintiff was also self-employed as a hair stylist. (Tp. 21). As a hair stylist, the Plaintiff worked out of the family home, which had been improved with the installation of a beauty shop in the basement. The salon had been operated by the Plaintiff in the home since approximately 1984. (Tp. 21-22). Plaintiff efforts in the cosmetology business netted, while in the home, approximately \$1,400.00 per month, without any deduction for taxes. (Tp. 25).

The division of debts and assets created a net equity to each party of approximately \$19,653.00. (R. 119). The establishment of the equities was based upon the parties stipulation to sell the home in which Plaintiff's shop was located. The sale of the home required Plaintiff to establish her business in another location. The relocation for Plaintiff's business would decrease the anticipated net because of payment of rent (\$25.00 day) (Tp. 32) decreased percentage on retail sales (10% v. 50%) (Tp. 35, 74-82) and a loss of clientele (Tp. 35-36, 77-91) to \$970.00 to \$1,400.00 per month (R. 119).

The Plaintiff's anticipated living costs and debt service would require, post-divorce, a monthly expenditure of \$1,873.00, prior to anything being earmarked for taxes. The Court concluded, after review of the facts, that an alimony award of \$300.00 per month was appropriate.

Summary of Argument

The Trial Court did not abuse its discretion in the making of the award of \$300.00 per month permanent alimony in favor of the Plaintiff. The Plaintiff's marginal financial condition and monthly expenses far out-stripped her ability to earn an income at the new location of her business. The new location of the business would result in an anticipated decrease in income from what Plaintiff had previously experienced. The Defendant's income would not be subject to any alteration and was approximately three times greater than that of the Plaintiff, creating an ability to pay support. In

order to reasonably equalize the living standards of the parties, the alimony award was mandated. Further, the alimony award was not limited to any time restriction, despite Plaintiff's request at trial for only a five (5) year period of alimony.

The Plaintiff is entitled to an award of attorney's fees for the appeal.

Argument I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN MAKING THE ALIMONY AWARD.

Alimony is authorized by the broad language of 30-3-5(1) U.C.A. which states that "when a Decree of Divorce is rendered, the Court may include in it equitable orders relating to the children, property, and parties."

Trial Courts have considerable discretion in determining the amount of alimony appropriate in a given case, and will be upheld unless a clear and prejudicial abuse of discretion is shown. Bridenbaugh v. Bridenbaugh, 786 P.2d 241, 242 (Utah Ct. App. 1988, citing Paffel vs. Paffel, 732 P.2d 96, 103 (Utah 1986) and Maughan vs. Maughan, 770 P.2d 156, 161 (Utah Ct. App. 1989)).

In the instant case, there has been no "clear and prejudicial abuse of discretion".

A.

CONSIDERATION OF THE REQUISITE FACTORS SUPPORTS THE ALIMONY AWARD.

...The standard for determining alimony awards is well settled. The trial judge is to consider three (3) factors: first, the

financial condition and needs of the party seeking alimony; second, the party's ability to produce a sufficient income for him or her self; and third, the ability of the other party to provide support. Davis v. Davis, 749 P.2d 647 (Utah 1988), citing Jones v. Jones, 700 P.2d at 1075 (quoting English v. English, 565 P.2d 409, 411-412 (Utah 1977)). See also Bridenbaugh v. Bridenbaugh, op.cit.

An analysis of the required factors notes the following:

1. Financial condition and needs of the Plaintiff. The Plaintiff was vested with net assets from the divorce of \$19,653.00, representing equity in the home, personal property, retirement and retirement interest. (R. 119). Plaintiff had neither assets independent of the marriage nor income producing assets as a result of the property division. Indeed, Plaintiff was faced with dire financial circumstances when noting her living expenses, without considering any sum for taxes to be at \$1,873.00 per month. (R. 120-121).

2. Ability to produce income. At the time of divorce, Plaintiff had been working as a cosmetologist for approximately five (5) years out of the family home, wherein her shop was located. In the family home, Plaintiff had no specific rent, and in fact enjoyed various tax benefits by including a business within the home and writing off expenses associated with the business. (Tp. 29). Further, Plaintiff enjoyed the benefit of a mark-up on retail products that she sold of approximately fifty percent (50%). (Tp.22).

Upon moving to a salon, the Plaintiff would then be faced with the following negatives: (1) \$25.00 per day rent (Tp. 32); (2) ten percent (10%) mark-up rather than fifty percent (50%) on retail sales (Tp. 35); and (3) reduction of clientele (Tp. 77, 91). The Court found that the resultant income that Plaintiff may net, prior to taxes, was in the range of \$970.00 to \$1,400.00 per month. (R. 119). Plaintiff's witness, Judy Barton, manager at the salon that Plaintiff intended to move into, testified that she earned \$275.00 per week net (\$1,182.50 per month) (Tp. 88).

3. The ability of the Defendant to pay alimony. No testimony was offered that Defendant's ability to pay alimony was subject to alteration, in fact, Defendant's income was guaranteed at Hill Air Force Base, unlike the Plaintiff whose income is subject to seasonal adjustment. The Defendant's income was not subject to any reduction for child support, since the alimony order did not take effect until July, 1989, after Jaime's eighteenth birthday. (R. 128). The Defendant was left with income approximately three (3) times that of the Plaintiff.

B.

IN ORDER TO MAINTAIN PLAINTIFF AT A STANDARD OF LIVING REASONABLY APPROXIMATING THAT OF THE DEFENDANT AND WHICH THE PARTIES ENJOYED DURING THE MARRIAGE, THE ALIMONY AWARD IS REQUIRED. In Gardner v. Gardner, 748 P.2d 1076 (Utah 1988), the Supreme Court reversed the District Court's decision, inter alia, on the issue of alimony determining that the sum awarded to the Plaintiff, wife,

was inadequate. In Gardner, the parties had been married in excess of thirty (30) years, and the husband was the sole source of income in the household as a surgeon. The Plaintiff had not worked out of the home for many years previously. The Court remanded the matter to the District Court, after reversal, and noted that:

An alimony award should, after a marriage such as this and to the extent possible, equalize the parties respective standards of living and maintain them at a level as close as possible to that standard of living enjoyed during the marriage. 748 P.2d at 1081. Citations omitted.

Herein, the District Court after examining the prescribed factors, concluded that the only way to reasonably equalize the standard of living for both Plaintiff and Defendant was to award \$300.00 in alimony to the Plaintiff. Not coincidentally that \$300.00 roughly approximates the difference between the maximum income that Plaintiff may earn, according to the Findings of Fact (R. 119) and the anticipated living expenses of Plaintiff, (R.120-121) which does not include a calculation for an amount for taxes. Indeed, the amount is modest.

C.

THE TRIAL COURT WAS NOT LIMITED TO AN ALIMONY AWARD OF FIVE (5) YEARS DURATION. Defendant suggests that any alimony award was limited to five (5) years, the time requested by Plaintiff at trial. As noted above, alimony is an item left to the sound discretion of the trial court, this includes not only the amount

(see Bridenbaugh, op.cit.) but the duration. In Re Marriage of Melville, 526 P.2d 1228 (Wash. App. 1974).

The original prayer for relief in Plaintiff's Complaint contained a request for a reasonable sum of alimony. (R. 2). Rule 54(c)(1) of the Utah Rules of Civil Procedure provides:

Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings...

The Court is not only vested with inherent discretion in the equity matter of a divorce but is authorized by statute to grant appropriate relief.

In Heim v. Heim, 763 P.2d 678 (Nevada 1988), the Nevada Supreme Court reversed the determination of the trial court regarding an alimony award to the former spouse of a physician as being insufficient. The Nevada Court utilized factors similar to those utilized in Utah to conclude that the Plaintiff wife had "been short-changed" where she was to receive \$500.00 per month alimony, when the marriage was long-term, she had no ready source of additional income, and the Defendant earned sufficient income to maintain her at a life-style similar to that enjoyed during the marriage. In remanding the case, the Court noted:

We will not invade the province of the trial court by determining what is the minimum amount which should be considered as a just and equitable alimony award in this case, but we believe that the award should not

necessarily be limited to the \$1,500.00 per month prayed for by Loretta Heim. 678 P.2d at 683.

Following the logic of the Nevada Supreme Court, the Trial Court herein was not limited to the five (5) year term of alimony as requested by the Plaintiff at trial.

Argument II

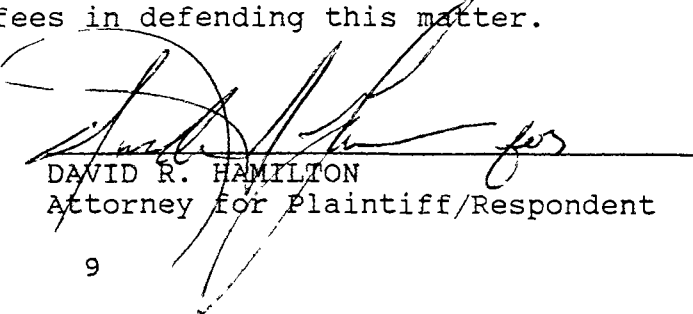
THE RESPONDENT IS ENTITLED TO ATTORNEY'S FEES IN THE APPEAL.

In responding to Defendant's appeal, the Plaintiff has incurred additional attorney's fees. Plaintiff was originally awarded \$1,000.00 in attorney's fees and requests that this matter be remanded to the District Court for an award of attorney's fees on the appeal. In Maughn v. Maughn, op.cit., the Utah Court of Appeals awarded attorney's fees and cited 30-3-3 U.C.A. noting that the statutes

"provides that either party to a divorce action may be ordered to pay the adverse party to prosecute or defend the action. This includes attorney's fees incurred on appeal. See e.g. Carter v. Carter, 584 P.2d 904 (Utah 1978); Marx v. Marx, 98 Utah 400, 100 P.2d 207 (1940); Hendricks v. Hendricks, 91 Utah 564, 65 P.2d 642, 643 (1937)." 770 at 162 through 163.

Conclusion

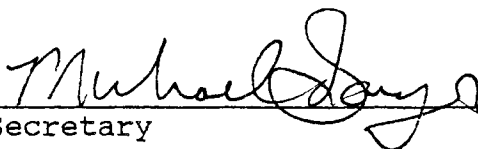
The District Court committed no error of law or abuse of discretion in making the alimony award, and Plaintiff/Respondent is entitled to her attorney's fees in defending this matter.


DAVID R. HAMILTON
Attorney for Plaintiff/Respondent

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed four (4) true and correct copies of the foregoing BRIEF OF PLAINTIFF/RESPONDENT, postage prepaid, this 6 day of July, 1990 to the following:

Brent A. Bohman
Attorney at Law
863 N. Maple Tree Court #624
Salt Lake City, Utah 84116


Secretary

ADDENDUM

30-3-3 U.C.A., 1953 as amended

The court may order either party to pay to the clerk a sum of money for the separate support and maintenance of the adverse party and the children, and to enable such party to prosecute or defend the action.

30-3-5 U.C.A., 1953 as amended

(1) When a decree of divorce is rendered, the court may include it in equitable orders relating to the children, property, and parties. The court shall include the following in every decree of divorce:

(a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children; and

(b) if coverage is available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children.

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the non-custodial parent to provide the day care for the dependent children, necessitated by the employment or training of the custodial parent.

(3) The Court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties, the custody of the children and their support, maintenance, health, and dental care, or the distribution of the property as is reasonable and necessary.

(4) In determining visitation rights of parents, grandparents, and other relatives, the court shall consider the welfare of the child.

(5) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.

(6) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is residing with a person of the opposite sex. However, if it is further established by the person receiving alimony that that relationship or association is without any sexual contact, payment of alimony shall resume.

(7) When a petition for modification of child custody or visitation provisions of a court order is made and denied, the court may order the petitioner to pay the reasonable attorney's fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted in good faith.

Rule 54, U.R.C.P.

RULE 54, Judgments; costs.

(a) Definition; form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment upon multiple claims and/or involving multiple parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of the final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is not just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and rights and liabilities of all the parties.

(c) Demand for judgment.

(1) **Generally.** Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

(2) **Judgment by default.** A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

(d) Costs.

(1) **To whom awarded.** Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause. Costs against the state of Utah, its officers and agencies shall be imposed only to the extent permitted by law.

(2) **How assessed.** The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court in which the judgment was rendered.

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date judgment is entered.

(3), (4) [Deleted.]

(e) Interest and costs to be included in the judgment. The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose and make a similar notation thereof in the register of actions and in the judgment docket.

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IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

CAROLYN RODRIGUEZ,

Plaintiff,

vs.

FIDEL H. RODRIGUEZ,

Defendant.

*
*
*
*
*
*
*
*

COMPLAINT

CIVIL NO. _____

Comes now the Plaintiff above named and for cause of action
against the Defendant, alleges as follows:

1. That the Plaintiff is now and has been for more than
three months a bona fide resident of Davis County, State of Utah.

2. That the Plaintiff and Defendant were married in
Essex County, England on or about the 17th day of June, 1967 and
ever since said time have been and now are husband and wife.

3. That the parties have had borne as issue of the
marriage, two children, to-wit: NICOLA ANN RODRIGUEZ, who is
emancipated and JAIME CHRISTOPHER RODRIGUEZ, born June 30, 1971.

4. That the parties have suffered irreconcilable
differences and are unable to continue the marriage.

5. That the parties have acquired certain real, personal
property and assets during the marriage.

6. That the parties have incurred certain debts and

obligations during the marriage.

7. That Plaintiff is self-employed as a hairdresser; Defendant works at Hill Air Force Base and earns in excess of \$3,000.00 per month.

8. That the Plaintiff has retained the services of an attorney to represent him in this matter and will incur certain costs of court.

WHEREFORE, Plaintiff prays for judgment against the Defendant as follows:

1. That the marriage between the parties be terminated on the grounds of irreconcilable differences.

2. That the Plaintiff be awarded the care, custody and control of the parties' minor child, subject to reasonable visitation by Defendant.

3. That Plaintiff be awarded a reasonable sum for child support.

4. That Plaintiff be awarded a reasonable sum for alimony.

5. That there be an equitable division of the assets of the parties.

6. That there be an equitable division of the debts and obligations of the parties.

7. That the Plaintiff receive a Judgment for her attorney's fees and costs.

8. That the Plaintiff be awarded such other and further

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Rodriguez v. Rodriguez
COMPLAINT
Page 3

relief as the Court deems proper.

DATED this 24th day of October, 1988.

Carolyn Rodriguez
Carolyn Rodriguez, Plaintiff

David R. Hamilton
David R. Hamilton
Attorney for Plaintiff

STATE OF UTAH)
 : SS
COUNTY OF DAVIS)

Personally appeared before me, Carolyn Rodriguez, who being first duly sworn, deposes upon her oath and says that she is the Plaintiff in the foregoing action and that all of the allegations contained herein are true to the best of her information and belief.

Charles L. Petty
Notary Public
Residing at: Cody, Wyo
My Commission Expires: 6-2-91

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IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

CAROLYN RODRIGUEZ,	*	
	*	
Plaintiff,	*	SECOND AMENDED FINDINGS OF
	*	FACT AND CONCLUSIONS OF LAW
vs.	*	
	*	
FIDEL H. RODRIGUEZ,	*	CIVIL NO. 44405
	*	
Defendant.	*	

The above-entitled matter came on regularly for trial on March 30, 1989 before the Honorable Douglas L. Cornaby, one of the Judges of the above-entitled Court. Plaintiff appearing in person and being represented by counsel, David R. Hamilton of Farr, Kaufman, Hamilton, Phillips, Sullivan, Gorman and Perkins; Defendant appearing in person and represented by counsel, Brent Bohman. The parties having Stipulated as to certain matters, testified on their own behalf and called witnesses and the Court being fully advised and having provided a subsequent ruling on Objections to prior findings, now makes the following:

FINDINGS OF FACT

1. That the parties, at the time of the filing of the divorce on October 27, 1988, had been bona fide Davis County residents for at least three months prior thereto.

Rodriguez v. Rodriguez
Civil No. 44405
SECOND AMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW
Page 2

2. That Plaintiff and Defendant were married in Essex County, England, on or about June 17, 1967 and ever since that time have been and now are husband and wife.

3. That the parties have had born as issue of the marriage, two children, to-wit: Nicola Ann Rodriguez, who is emancipated and Jaime Christopher Rodriguez, born June 30, 1971.

3. That the parties have suffered irreconcilable differences and are unable to continue the marriage.

4. That the Court accepts the Stipulation entered into by the parties, which was affirmed by each party in open Court as follows:

A. That the Plaintiff be granted a Decree of Divorce.

B. That the Plaintiff is a fit and proper person to be awarded the care, custody and control of the parties' minor child.

C. That the Defendant should be granted reasonable visitation of the minor child at reasonable times and places.

D. That the Plaintiff should be awarded child support in the sum of FOUR HUNDRED SIXTY TWO DOLLARS (\$462.00) per month, based upon the combined monthly gross income of FOUR THOUSAND FOUR HUNDRED THIRTY NINE DOLLARS (\$4,439.00).

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Rodriguez v. Rodriguez
Civil No. 44405
SECOND AMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW
Page 3

E. That the parties should file a joint tax return for the 1988 tax year and divide equally any refund or obligation.

F. That the home and real property located at 760 East 2000 North, Layton, Davis County, Utah, be listed for sale, the same having already been accomplished through Wardley Realtors, with an estimated equity of between \$24,000.00 to \$29,000.00, and that the proceeds be divided equally, subject to further Order as set forth below.

G. That the Defendant should provide to Plaintiff, health insurance benefits through his employment, pursuant to COBRA, for a period of three years after the entry of the Decree of Divorce, subject to Plaintiff paying any additional costs to maintain the coverage in her behalf. Determination with regards to the maintenance of the health policy will be at the discretion of the Plaintiff.

H. That the Plaintiff should be awarded as her separate property, the following:

1. Her business assets and inventory.
2. 1984 Blazer.

Rodriguez v. Rodriguez
Civil No. 44405
SECOND AMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW
Page 4

3. The couch/chairs, dining room set, coffee and end tables, waterbed, dresser, bed, TV, VCR, lamps, refrigerator, freezer, toby jugs, brass clock, her ring, bracelet, watch, fur coat, crystal glasses, cash surrender value in Provident Life of \$536.00, those gifts received from her mother's estate, one-half of the Defendant's retirement through Hill Air Force Base, pursuant to the Woodward formula, which gives each party \$15,000.00, one-half of the savings bonds, for a total value of approximately \$26,241.00.

I. That the Defendant should be awarded as his separate property, the following:

A. The 1982 Toyota, 1968 Mustang, Motorcycle.

B. The antique shelves, couch, antique end tables, brass lamps, antique double bed, gas bar-b-que, his ring, cash surrender in Provident Life policy of \$851.57, one-half of his retirement which has a value of \$15,000.00, compressor,

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Rodriguez v. Rodriguez
Civil No. 44405
SECOND AMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW
Page 5

welder, two table saws, assorted hand tools, boat, trailer, scuba equipment, camera, lenses, his guns, including Model 70 shotgun, .22 pistol, Weatherby rifle, 44 pistol, one-half of the savings bonds, for a total value of approximately \$25,075.00.

J. That the Plaintiff is to pay the following debts: First Security, Nordstroms, Weinstocks, Bon Marche, J.C. Penney's and the America First Credit Union on the Blazer. The total indebtedness to Plaintiff is \$3,950.00.

K. That the Defendant is to pay the following debts: Dr. Christensen, America First Credit Union debts on the Toyota, Visa and the boat. The total indebtedness to Defendant is approximately \$8,060.00.

5. That the parties are obligated to America First Credit Union on a line of credit in the sum of approximately \$4,700.00. The Defendant is to make all payments on the obligation as they become due until the home is sold. The balance that exists at the time the home is sold shall be paid from the home sale price and the Defendant reimbursed for payments made on the line of credit obligation after March 30, 1989 until the sale of the home.

Rodriguez v. Rodriguez
Civil No. 44405
SECOND AMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW
Page 6

6. That the assets of the parties should be divided equally, such that each party receives approximately \$19,653.00 in assets. The gross equity between the assets and debts, as agreed upon between the parties, is such that the Plaintiff would receive approximately \$22,291.00 and the Defendant \$17,015.00. An appropriate equalization would be accomplished by the Defendant receiving \$2,638.00 more of the proceeds from the sale of the home.

7. That the parties have a joint savings account with approximately \$384.00 therein, which should be divided equally.

8. That the Defendant is employed at Hill Air Force Base and earns approximately \$3,159.00 per month gross.

9. That the gross income of the Plaintiff is uncertain, due in part, to the fact that the Plaintiff will be required to leave the home beauty salon and establish her business at a location by renting booth space at a salon. Plaintiff's gross income is subject to business expenses, which Plaintiff estimates would result in a net income of approximately \$970.00. Defendant estimates that Plaintiff's net income would be closer to \$1,400.00.

Regardless of the calculation of the Plaintiff's income, the Defendant earns considerably more through his employment.

10. That the marriage is long term with a duration of approximately 22 years.

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Rodriguez v. Rodriguez
Civil No. 44405
SECOND AMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW
Page 7

11. That the Defendant's responsibility for the minor child ends at the age of 18; however, it appears to the Court that the Plaintiff will continue to have the children reside with her for a time and, in fact, 'be supporting the children of the marriage to some extent.

12. That the Defendant's obligation for child support will terminate at the end of June, 1989.

13. That the home and real property may not sell immediately and the parties will need to satisfy the underlying mortgage payments until such time that the sale occurs. The parties should each pay one-half of the mortgage debt on the home, beginning with the month of July, 1989. The total payments are \$739.00; therefore, each party would be required to pay a total of \$370.00 per month until the time of the sale. The Defendant should have the opportunity, if he desires, to take over the property beginning in July, 1989, in which case he would be responsible for the entire monthly payment.

14. That the party living in the home is responsible for normal maintenance of the home. Any major cost or repair which is not the result of normal wear and tear must be borne equally by both parties. For example, a broken window or broken door must be repaired by the house resident; however, painting rooms, new roof, new furnace, etc., must be borne by the parties equally.

15. That the Plaintiff's estimated monthly living expenses

Rodriguez v. Rodriguez
Civil No. 44405
SECOND AMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW
Page 8

are approximately \$1,455.00, with debt service of \$318.00, with no calculation being made for taxes.

16. That Plaintiff is hereby awarded, as a property award, and not as alimony, one-half (1/2) of a fractional share of Defendant's Civil Service retirement (unreduced for survivor benefits), which shall be divided pursuant to the formula set forth in the Utah case of Woodward v. Woodward, 656 P.2d 431. Plaintiff's share of said benefit shall be paid to her directly by Civil Service. The numerator of said fraction shall be the figure 21, representing the total number of years that the parties have been married to each other while Defendant has been accruing retirement benefits, and the denominator of said fraction shall be a sum equivalent to the total number of years Defendant will have been employed accruing Civil Service benefits by the time he terminates his employment. In the instant case, the calculation results in a specific dollar award to Plaintiff of FIFTEEN THOUSAND DOLLARS (\$15,000.00).

17. That the Plaintiff is in need of and entitled to a reasonable sum for alimony.

18. That Plaintiff has employed David R. Hamilton of Farr, Kaufman, Hamilton, Phillips, Sullivan, Gorman and Perkins, to represent her in connection with the divorce matter and incurred attorney's fees therein in the approximate sum of \$1,809.00, together with costs of Court of \$172.00.

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Rodriguez v. Rodriguez
Civil No. 44405
SECOND AMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW
Page 9

19. That the Defendant should contribute towards Plaintiff's attorney's fees.

BASED UPON the foregoing Findings of Fact, the Court enters the following:

CONCLUSIONS OF LAW

1. That the Plaintiff should be granted a Decree of Divorce terminating the marriage between she and the Defendant, the same to be final upon the date of signature and entry thereon.

2. That the Stipulation entered into between the parties and approved in open Court, and repeated in the Findings above, is reasonable and accepted by the Court.

3. That the savings account at First Security Bank with an approximate balance of \$384.00 should be divided equally by the parties.

4. That as to the home and real property, the same should be sold and first pay the costs of sale, mortgages and a line of credit with America First Credit Union; thereafter, the remaining proceeds should be divided equally, provided, however, that the Defendant be reimbursed for payments made on the line of credit until the time of sale and, further, that the Defendant be entitled to \$2,638.00 more than the Plaintiff in the distribution of the proceeds. The party living in the home is responsible for normal maintenance of the home. Any major cost or repair which is not the result of normal wear and tear must be borne equally by

Rodriguez v. Rodriguez
Civil No. 44405
SECOND AMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW
Page 10

both parties.

5. That the Plaintiff be awarded alimony in the sum of \$300.00 per month, payable until her death, cohabitation or remarriage, beginning with the month of July, 1989.

6. That the Plaintiff be awarded Judgment against the Defendant in the sum of \$1,000.00 to be applied to Plaintiff's attorney's fees.

7. That the home and real property be sold. Until the time of sale, the Plaintiff may remain in the home. She shall be required to make the first mortgage payment and the Defendant the second mortgage payment, through June, 1989; thereafter, the Plaintiff and Defendant shall each contribute the sum of \$370.00 per month towards the ongoing mortgage obligations until the time of sale. Should the Defendant desire to occupy the premises, he may do so, subject to reasonable notice to the Plaintiff. If the Defendant so elects, he will be required to satisfy the first mortgage, second mortgage and line of credit until such time the home sells.

8. That Plaintiff be entitled to a share of Defendant's Civil Service retirement, in the sum of \$15,000.00, pursuant to Woodward v. Woodward, Supra.

DATED this 14 day of July, 1989.

District Court Judge

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IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

CAROLYN RODRIGUEZ,	*	
	*	SECOND AMENDED
Plaintiff,	*	DECREE OF DIVORCE
	*	
vs.	*	
	*	
FIDEL H. RODRIGUEZ,	*	CIVIL NO. 44405
	*	
Defendant.	*	

The above-entitled matter came on regularly for trial on March 30, 1989 before the Honorable Douglas L. Cornaby, one of the Judges of the above-entitled Court. Plaintiff appearing in person and being represented by counsel, David R. Hamilton of Farr, Kaufman, Hamilton, Phillips, Sullivan, Gorman and Perkins; Defendant appearing in person and represented by counsel, Brent Bohman. The parties having Stipulated as to certain matters, testified on their own behalf and called witnesses and the Court being fully advised and having provided a subsequent ruling on Objections to prior Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That the Plaintiff be and hereby is granted a Decree of Divorce terminating the marriage between she and the Defendant, the same to be final upon the date of signature and entry thereon.

2. That the Plaintiff be and hereby is awarded the care,

Rodriguez v. Rodriguez
DECREE OF DIVORCE
Civil No. 44405
Page 2

custody and control of the parties minor child, Jaime Christopher Rodriguez.

3. That the Defendant be and hereby is awarded reasonable rights of visitation of said minor at reasonable times and places.

4. That the Plaintiff be and hereby is awarded child support from the Defendant in the sum of \$462.00 per month, the same to be payable, one-half on or before the 5th of the month, the other half to be paid on or before the 20th of each month, until such time that the minor child reaches the age of 18 in the month of June, 1989, Defendant's last payment will be for the month of June, 1989.

5. The child support to be paid shall be subject to the provisions of Title 78-45(D)(1), et seq., U.C.A., and a Withhold and Deliver Order is hereby implemented in this case on behalf of the Plaintiff, a copy the same is attached hereto as Exhibit "A".

6. That the parties file a joint tax return for the 1988 tax year and divide equally any refund or obligation.

7. That the home and real property located at 760 East 2000 North, Layton, Davis County, Utah, be sold. From the proceeds of the sale of the home, the first mortgage, second mortgage and line of credit at America First Credit Union shall be paid; thereafter, the parties shall divide equally the proceeds, except that the Defendant be entitled to a sum of \$2,638.00 greater than that of the Plaintiff; further, Defendant shall also

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Rodriguez v. Rodriguez
DECREE OF DIVORCE
Civil No. 44405
Page 3

be reimbursed for all payments made on the line of credit debt up until the time of the sale of the property. The party living in the home is responsible for normal maintenance of the home. Any major cost or repair which is not the result of normal wear and tear must be borne equally by both parties.

8. That the Plaintiff be awarded as her sole and separate property, the following: Her business assets, the 1984 Blazer, couch, chairs, dining room set, coffee and end tables, waterbed, dresser, bed, TV, VCR, lamps, refrigerator/freezer, toby jugs, brass clock, Plaintiff's ring, bracelet, watch, fur coat, crystal glasses, cash surrender value in the Provident Life policy, all those gifts and inheritance received from her mother's estate, one-half of the savings bonds, together with a \$15,000.00 interest in the Plaintiff's retirement at Hill Air Force Base, together with her personal belongings and effects.

9. That the Defendant be awarded as his sole and separate property, the following: 1982 Toyota, 1968 Mustang, motorcycle, antique shelves, couch, antique end tables, brass lamps, antique double bed, gas bar-b-que, Defendant's ring, one-half of his current retirement, which is \$15,000.00, together with any other amounts accrued in the retirement after the date of divorce, the compressor, welder, two table saws, assorted hand tools, boat, trailer, scuba equipment, camera equipment, lenses, Model 70 shotgun, .22 pistol, Weatherby rifle, 44 pistol, one-half of the

Rodriguez v. Rodriguez
DECREE OF DIVORCE
Civil No. 44405
Page 4

savings bonds, together with his personal belongings and effects.

10. The Plaintiff is hereby Ordered to assume and discharge the indebtedness to First Security, Nordstoms, Weinstocks, Bon Marche, J.C. Penney's and America First Credit Union for the Blazer, together with any other debts and obligations she has incurred since the time of the filing for divorce and hold Defendant harmless.

11. The Defendant is hereby Ordered to assume and discharge any indebtedness to Dr. Christensen, America First Credit Union on the Toyota, Visa and the boat, together with the monthly payments on the line of credit until such time as the home is sold and any other debts and obligations he has incurred since the time of filing of the divorce action and hold Plaintiff harmless.

12. That the joint savings account at First Security Bank, having an approximate balance of \$384.00, should be divided equally.

13. That the Defendant pay the Plaintiff the sum of \$300.00 per month, as and for alimony, payable until Plaintiff's death, cohabitation or remarriage, beginning with the month of July, 1989.

14. That Plaintiff is hereby awarded, as a property award, and not as alimony, one-half (1/2) of a fractional share of Defendant's Civil Service retirement (unreduced for survivor

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Rodriguez v. Rodriguez
DECREE OF DIVORCE
Civil No. 44405
Page 5

benefits), which shall be divided pursuant to the formula set forth in the Utah case of Woodward v. Woodward, 656 P.2d 431. Plaintiff's share of said benefit shall be paid to her directly by Civil Service. The numerator of said fraction shall be the figure 21, representing the total number of years that the parties have been married to each other while Defendant has been accruing retirement benefits, and the denominator of said fraction shall be a sum equivalent to the total number of years Defendant will have been employed accruing Civil Service benefits by the time he terminates his employment. In the instant case, the calculation results in a specific dollar award to Plaintiff of FIFTEEN THOUSAND DOLLARS (\$15,000.00).

15. That the Plaintiff is granted Judgment against the Defendant in the sum of \$1,000.00 as and for attorney's fees.

16. That the parties sign any and all documents necessary to complete property awards as ordered herein.

DATED this ____ day of ^{June}~~June~~, 1989.

B/
District Court Judge

APPROVED AS TO FORM:

Brent A. Bohman
Attorney for Defendant